Kennecott Corporation
10 East South Temple
P.O. Box 11248
Salt Lake City, Utah 84147
(801) 322-8274
FAX (801) 322-8260

Bob E. Cooper
President and Chief Executive Officer

Wayne
M/035/002

Kennecott

FAX 1-202-260-4852

June 17, 1993

Mr. Robert M. Sussman
Deputy Administrator
U. S. Environmental Protection Agency
401 M Street, SW
Washington, D. C. 20460

Dear Mr. Sussman:

KENNECOTT UTAH COPPER CLEANUP

The attached description of the outstanding issues related to the draft consent decree for the cleanup of our Utah Copper facility addresses concerns you identified during our June 9 meeting. The list includes several substantive issues as well as a few less critical clarifications. This is precisely the same list Kennecott presented to Robert Duprey on February 1 of this year.

Kennecott shares your concern about the amount of time that has been devoted to consent decree negotiations. However, this pilot project would address as many as 20 separate sites, and it would cover the entire range of actions contemplated by the NCP from preliminary assessments through operation and maintenance of the final remedies. Considering the number of individual consent decrees or orders that would normally be negotiated in such circumstances (perhaps as many as 40) and the time that would be required to negotiate those agreements, the time we have spent on negotiations to date can hardly be considered excessive.

Most importantly, the consent decree negotiations have not slowed cleanup in any way. Since negotiations began, Kennecott has undertaken cleanups on roughly half of the sites identified as needing some action. Most of this work has been conducted on a completely voluntary basis by Kennecott, some of it has been done under EPA's oversight through administrative orders on consent that were negotiated on a parallel track with the consent decree negotiations. Study and design work is already underway on most of the remaining, lower priority sites. Kennecott is not aware of any CERCLA cleanup (particularly those at NPL sites) that can claim a comparable record.

With regard to our discussion about a model voluntary cleanup agreement, I believe many of the concepts developed in our consent decree negotiations could easily be adapted to such an approach. Further, our Utah Copper facility presents a unique opportunity to demonstrate the government/industry partnership advocated by the Clinton administration rather than the command and control, adversarial approach that has characterized and hampered the Superfund program in the past. Because the draft consent decree embodies not only the routine Superfund command and control approach, but in many ways represents a "Superfund-plus" approach, it has limited utility at other sites. The second attachment to this letter contains a listing of some of the key concepts that I believe should be incorporated in such a voluntary agreement. The list is not intended to be all-inclusive. These concepts have been presented in summary form to avoid complicating the decision at hand with respect to the consent decree negotiations. I would be pleased to transmit our detailed thoughts on a voluntary cleanup approach to you separately at a later date.

I would be happy to discuss any questions or concerns you may have after you have had an opportunity to review the list of outstanding issues. Regardless of your decision on the future of the consent decree negotiations, I assure you that Kennecott remains committed to the expeditious cleanup of its Utah Copper facility.

Sincerely,

Bob E. Cooper

Encl.

cc: J. McGraw, EPA Region VIII (w/encl.)
D. Nielson, Utah DEQ (w/encl.)

ATTACHMENT 1
OUTSTANDING CONSENT DECREE ISSUES

PRIMARY ISSUES:

1. Financial Assurances

Because the consent decree will be signed well in advance of the selection of response actions for the operable units at Utah Copper, the decree needs to include a mechanism, with appropriate criteria, for developing reasonable estimates for the cost of uncompleted work. The cost of the most likely response action at a particular operable unit may be considerably less than the worst-case alternative. If EPA simply uses costs associated with the worst-case alternative for the approximately 20 operable units, Kennecott will not be able to meet the financial assurance tests. Kennecott recognizes the importance of developing a procedure that fully comports with the requirements of the NCP and does not appear to select a response action without following the appropriate steps, including public participation.

Where Kennecott is unable to provide financial assurance but is otherwise proceeding with work, the company should not be liable for stipulated penalties.

A mutually acceptable subordination agreement needs to be negotiated (as an appendix to the consent decree) so that the parties will know in advance what will be required if such an agreement becomes necessary.

The consent decree must unambiguously, and without internal contradiction, state that Kennecott has the right to terminate the decree if (1) the amount of financial assurance exceeds $175 million, (2) Kennecott is unable in good faith to provide financial assurance in excess of $175 million, and (3) the agencies propose listing. EPA's last iteration of the consent decree contains conflicting language (Paragraph 63(b) v. Paragraph 10(e)) regarding Kennecott's ability to terminate the decree where EPA proposes listing due to failure to provide financial assurances. This needs to be corrected.

2. Listing

Paragraph 10(b) does not reflect either the AIP or EPA's October 9 draft of the CD and should be modified accordingly. The listing contemplated in a 10(b) situation is only for failure to perform a response action.

As an editorial clarification, the last iteration of the consent decree states that if listing is proposed by the agency where the decree does not specifically provide for listing, the decree would terminate except for any covenants. It was agreed that only covenants not to sue, rather than general covenants, would survive termination under such circumstances. This omission needs to be corrected.

3. Pollutants and Contaminants

The consent decree needs to expressly state that before Kennecott can be required to address pollutants and contaminants, EPA first must demonstrate that the two threshold requirements of section 104 of CERCLA have been satisfied: (1) that the substance is in fact a pollutant or contaminant, and (2) that the pollutant or contaminant in question presents an imminent and substantial danger to public health and welfare. Contradictory language in the decree needs to be deleted.

4. Interpretation and Construction of the CD

Although Kennecott is willing initially to use the dispute resolution process for issues of interpretation or construction of the consent decree, the decree needs to expressly state that the court, in determining the applicable standard of review to apply to such issues, cannot draw any inferences from or base its determination (in whole or in part) upon the fact that the parties used the dispute resolution process. Similarly, EPA cannot use dispute resolution as a basis for asserting a particular standard of review for such issues. The decree needs to specifically state that issues of interpretation or construction of the decree are not subject to stipulated penalties. (EPA could seek statutory penalties if it felt that they were warranted.) Obviously, if the court determines that a particular issue is not one of interpretation or construction, stipulated penalties could apply.

5. Thresholds

Dispute resolution and judicial review of issues relating to whether the threshold amounts have been satisfied need to be the same as for issues of interpretation and construction of the consent decree. That is, the court will determine the applicable standard of review for resolving threshold issues, and the fact that the parties initially use the dispute resolution process in an attempt to resolve such issues can neither be used by EPA nor relied upon by the court as a ground for determining the applicable standard of review.

6. Contingency Fund

Where, consistent with the provisions of the consent decree, EPA uses the contingency fund to undertake a response action, issues relating to such response actions need to be subject to the same dispute resolution and judicial review provisions as any other response action under the decree.

7. Termination

The decree needs to include a procedure similar to the certification of completion process used to terminate administrative orders on consent so that there will be a mechanism to trigger EPA's determination of completion of work at a particular operable unit and include a time frame within which EPA will use best efforts to complete its determination. Additionally, the decree needs to expressly state that EPA's operable unit by operable unit determinations of completion are subject to dispute resolution and judicial review the same as any other response action issue (subject, of course, to the applicable threshold requirements).

LESS CRITICAL:

1. Stipulated Penalties

Kennecott has asked that the agencies be required to notify the company in writing of any violation of the decree that would result in accrual of stipulated penalties. Although notice may not be as important where there is a delay in meeting previously scheduled deadlines, it is critical, for example, when it concerns a deliverable being considered unacceptable by the agencies. If a document were submitted on time but the agencies did not review it for several months because of other priorities, and then found the deliverable unacceptable, Kennecott could be liable for almost $1 million in stipulated penalties even though the company was not aware of any problems. Penalties should not begin to accrue until Kennecott is on notice that a deficiency exists and has an opportunity to abate the deficiency.

In Paragraph 89, EPA must act expeditiously so that stipulated penalties do not accrue simply due to agency delay.

2. Integration/Survival of AOCs

To avoid future disputes, the decree needs to include greater specificity on the relationship of the existing consent orders to the decree. The language in the last iteration of the consent decree is too ambiguous. For example, paragraphs addressing waiver of claims, reimbursement of response costs, and the effect of settlement should take into account the consent orders. We simply need to be sure we do not have conflicting requirements that will cause disputes.

3. Agencies Response Costs

Kennecott has agreed to replenish the agencies' special oversight accounts based upon the agencies' estimates of future oversight costs. Replenishment should be on an as-needed basis, however, and not just because the fund drops below some arbitrary level. Money should not be sitting in a non-interest bearing account if it is not reasonably expected to be used in the near term.

Because Kennecott is required under the decree to perform work for which it may later seek contribution, the decree should not prohibit the company from seeking access to cost documents that may be available to other parties in subsequent litigation.

4. Enforcement

The parties agreed that where Kennecott waives its right to challenge "liability," it is intended that "liability" means only the four categories of liable parties under section 107 of CERCLA. The decree needs to include an express statement to this effect so that "liability" is not confused with issues concerning the scope of the decree.

ATTACHMENT 2
VOLUNTARY CLEANUP AGREEMENT CONCEPTS

A. Concepts Already in Draft Consent Decree

Deferred NPL Listing
Comprehensive, Coordinated Approach to Cleanup
Expedited Cleanup through Use of:
- Study Area Management Plan
- Site-Wide Risk Assessment
  Generic Work Plans
  Presumptive Response Actions
  Greater Use of Removals (Early Risk Reduction)
- Enhanced Public Participation through Committees and Task Forces
- Advance Payment of Agency Oversight Costs
  Cleanup First, Contribution Later without Cleanup Delays
- Municipal and DeMinimis Liability Provisions
  Reduced Transaction Costs
  Integration of Ongoing Operations

B. Concepts Needed to Make Voluntary Agreement Attractive to Industry

- Streamlined Agency Oversight
- Expedited, Balanced Dispute Resolution Process
- Fair Judicial Review (without Delaying Cleanup)
- Greater Agency Accountability for Oversight Costs
- Reasonable Financial Assurance Provisions (No Penalties if Cleanup Is Proceeding)
- Agency Commitment to Act Expeditiously
- Ability for State Leads
- Consideration of Future Land Use
  Realistic Risk Assessments
  Stipulated Penalties:
    Reduced Number
    Reduced Amounts
  - Notice of Deficiency
  - Opportunity to Correct
  - Encouragement for Innovative Cleanup Approaches, with No Penalties if Innovative Solutions Fail